SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
OCT 15 1973
MICHAEL RODAK, JR., CLERK

73- 667

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. A-215

WALLACE LEWIS McLENNAN,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

WILLIAM LEE LACKEY
P. O. Box 268
Savannah, Tennessee 38372
Counsel for Petitioner

COURT INDEX PRESS, INC. — 809 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Constitutional provisions involved	2
Statement of the case	3
Reasons for granting the Writ	4
Conclusion	6
Appendix:	
Opinion of the Court of Criminal Appeals of Tennessee	7
Dissenting Opinion in the Court of Criminal Appeals of Tennessee	17
Judgment of the Court of Criminal Appeals of Tennessee	27
Opinion of the Supreme Court of Tennessee	29
Judgment of the Supreme Court of Tennessee	35
Order denying Petition to rehear	38

II.

Citations:

	Page
Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed 2nd 889 (1968)	4, 5
Wilson v. Porter, 361 F. (2d) 412 (1966)	5
Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)	6

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. A-215

WALLACE LEWIS McLENNAN,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

The Petitioner, Wallace Lewis McLennan, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Tennessee entered in this proceeding on May 7, 1973 and the denial of the Petition to rehear entered on June 7, 1973.

OPINION BELOW

The opinion of the Supreme Court of Tennessee, marked for publication, but not yet reported, appears in the Appendix hereto. The opinion of the Court of Criminal Appeals of Tennessee also appears in the Appendix hereto, together with the dissenting opinion.

JURISDICTION

The Judgment of the Supreme Court of Tennessee was entered on May 7, 1973. A timely petition for rehearing was denied on June 7, 1973. On August 21, 1973 Mr. Justice Rehnquist signed an order extending the time for filing this petition for certiorari to and including October 19, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTION PRESENTED

Whether the stopping of the defendant by city police officers at 3:30 A.M., for no reason other than general suspicion and the time of morning, was an unlawful stopping, arrest or seizure such that any evidence discovered subsequent to the seizure would be inadmissible against the defendant as having been obtained in violation of the rights of the defendant under the 4th Amendment to the Constitution of the United States.

CONSTITUTIONAL PROVISION INVOLVED

4th Amendment to the Constitution of the United States:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable causes, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

14th Amendment to the Constitution of the United States:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

At about 3:00 or 3:30 A.M. on October 17, 1970 two city policemen on regular patrol saw an automobile pull out into a main street from a closed service station and they began to follow it. The car was not speeding or being driven in any unlawful manner. After following the car for a few hundred yards the officers turned on their blue lights and stopped the car.

The officers testified that they stopped the car because of the hour and because it arroused some suspicion pulling from a closed service station. There was no violation of any law or ordinance and there was no unusual activity in the car. The car had national guard license plates, not designating the county in which the car was registered.

The officers approached the car and asked for identification of the driver, the Petitioner in this Court. When he opened the car door the light inside the car came on and the officers saw tools and other items which could be used as burglary tools. The Petitioner and a passenger were seized by the officers.

The police subsequently discovered a burglary had occurred in the area and the Petitioner and passenger were tried for possession of burglary tools and burglary. The Petitioner was acquitted of the burglary charge and convicted of possession of burglary tools.

Prior to trial, Petitioner filed a motion to suppress the evidence obtained as a result of the stopping on the grounds that the stopping was unlawful and resulted in an unlawful search and seizure in violation of the 4th Amendment to the Constitution of the United States and the Tennessee Constitution. (Volume I of Certified Record, page 8) There was a hearing on the motion to suppress and the Trial Court overruled the motion to suppress. (Volume 2 of Certified Record, page 30)

The question of the unlawful stopping and unlawful search and seizure was again raised in the assignments of error filed in the Court of Criminal Appeals. (Volume 4 Certified Record) The Court of Criminal Appeals reversed the conviction of the Petitioner. (Volume 4 Certified Record) The State of Tennessee petitioned the Supreme Court of Tennessee for a Writ of Certiorari which was granted and the Supreme Court of Tennessee reversed the Court of Criminal Appeals and affirmed the conviction, which opinion is filed herewith as an appendix to this petition.

REASONS FOR GRANTING THE WRIT

This Court should grant this petition for a writ of certiorari because the decision of the Supreme Court of Tennessee has extended the rule set out by this Court in *Terry* v. *Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2nd 889, to an illogical limit and has thus severely limited the rights of the people set out in the 4th Amendment to the Constitution of the United States.

In the case the facts, as set out above show, the city police officers, while on patrol in their car at 3:30 A.M. saw the car driven by the Petitioner pull from a closed service station onto the street and proceed down the street. There was no violation of any law observed by the officers, yet they

stopped the car because it was suspicious. Under these circumstances the Supreme Court of Tennessee held the police "officers had a right to stop the car to ascertain the identity of the occupants and where they resided." This is in our view a gross violation by the police of the rights of the people under the 4th Amendment. If officers are to be allowed to stop any car at any time simply because it looks suspicious and they would like to know the identity and residence of the occupants, citizens would loose their right to travel freely from one place to another, even one state to another. If the decision in this case is left unquestioned, it could have far reaching effects on the rights of all people in the United States.

The Supreme Court of Tennessee, without saying so, has taken the decision of *Terry* v. *Ohio,* supra, and expanded it to open wide the doors of temptation to the police. The Attorney General of Tennessee in his arguments before both the Court of Criminal Appeals of Tennessee and the Supreme Court of Tennessee vigorously argued that the rule of the *Terry* case should be adopted in Tennessee. However, the Supreme Court of Tennessee, even though it saw fit not to mention that case in its opinion, extended the rule of that case to the outer limits of logic.

All of the cases cited by the Supreme Court of Tennessee, in its opinion, deal with detention for investigation, not mere inquiry as to identity and residence. Courts have long held that general suspicion is not enough to detain a person. One of the cases cited by the Supreme Court of Tennessee, *Wilson* v. *Porter,* 361 F (2d) 412 (1966), states that a "founded suspicion" is necessary before any detention would not be arbitrary and harrassing. There was no founded suspicion or any suspicion other than general wondering suspicion in this case. The decision below

is thus a sweeping extension of the law beyond what has been allowed by this Court.

Also important to the decision of this case is the question of whether or not the decision of this Court in the case of *Wong Sun* v. *United States,* 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. (2d) 441, should be applicable to state trials. Justice Russell of the Tennessee Court of Criminal Appeals, in his dissenting opinion in this case stated that even if the stopping by the officers was illegal that the fruit of the illegal stopping was still admissible because *Wong Sun* is inapplicable to state trials. Petitioner insists that the decision of *Wong Sun* must be made applicable to state trials through the 14th Amendment to the Constitution of the United States lest the states be allowed to deny the rights of the people guaranteed by the 4th Amendment.

It is, thus, of the utmost importance for this Court to deal with the detention which occurs daily and especially to decide whether the police are to be allowed to stop and detain persons on a very general suspicion as was done here and as was approved by the Supreme Court of Tennessee.

CONCLUSION

For all of the above reasons, a Writ of Certiorari should issue to the Supreme Court of Tennessee to review the Judgment and opinion of that Court in this case.

Respectfully submitted,

WILLIAM LEE LACKEY

P. O. Box 268
Savannah, Tennessee 38372

Counsel for Petitioner

APPENDIX

THE COURT OF CRIMINAL APPEALS OF TENNESSEE JACKSON, NOVEMBER 1971 TERM

WALLACE LEWIS McLENNAN
Plaintiff in Error

v.

STATE OF TENNESSEE
Defendant in Error

No. 2
Hardin County
Honorable James L. England, Judge

(Carrying Burglarious Instruments)

(Filed May 4, 1972)

For Plaintiff in Error:
W. Lee Lackey
Savannah, Tennessee

For Defendant in Error:
David M. Pack
Attorney General of Tennessee

Robert H. Roberts
Assistant Attorney General
Nashville, Tennessee

John L. Williams
District Attorney General
Huntington, Tennessee

OPINION FILED: MAY 4, 1972

REVERSED AND REMANDED

W. Wayne Oliver

Judge

OPINION

Represented by retained counsel, McLennan was convicted in the Circuit Court of Hardin County of carrying burglarious instruments in violation of TCA § 39-908 and was sentenced to imprisonment in the penitentiary for not less than one nor more than 10 years. He has duly perfected his appeal in the nature of a writ of error to this Court.

Although the defendant and Jackie Wayne Welch were indicted jointly, the first count charging them with possession of designated tools and the second charging them with burglarizing the Big Value Food Store in Savannah, Tennessee, the defendant was tried alone and was acquitted of the second count.

For reasons which will become apparent, we first consider the defendant's fourth and fifth Assignments of Error. Although his fifth Assignment complaining of the action of the trial court in overruling his motion to suppress evidence was not included as such in his new trial motion, for all practical purposes that complaint is embodied in the fourth Assignment which was included in his motion for a new trial. By the latter Assignment the defendant urges upon us here that he was illegally arrested and that the search of his automobile and the seizure of tools and gloves and other items was likewise unlawful, and that the court erred in permitting those articles to be introduced in evidence and in allowing the officers to testify about them over his objection.

About 3:00 or 3:30 a.m. on October 17, 1970, Savannah Policemen Cannon and Alexander, on regular patrol in that city in Hardin County, Tennessee, saw an automobile pull out into the street from a closed service station and they followed it. The car carried a Tennessee National Guard license plate, was not speeding or being driven erratically or otherwise in violation of law. After a short distance the officers stopped the car because, as Officer Cannon put it, "we stop any car coming out from a business at 3:00 o'clock in the morning." Alexander testified that they stopped the car because the filling station had been closed for several hours "and we couldn't figure why they would have any business in the service station, at that time of night. It did arouse some suspicion." The defendant was driving and Welch was riding beside him. Officer Cannon went to the driver's side and Officer Alexander went to the right side of the car. Officer Cannon asked the defendant to see his driver's license. In the pre-trial hearing on the defendant's motion to suppress evidence (the transcript of which the trial court authenticated as a part of the record in this case), Officer Cannon testified that when the defendant opened the car door the light came on inside the car and he saw two walkie-talkie radios on the back seat and a bag on the floor with a sledge hammer handle and a crowbar sticking out of it, and that Welch wore a coat, and on his coat and in his hair was some material resembling sawdust and he had a pair of cloth gloves between his knees and a set of keys in his shirt pocket. In the suppression hearing Cannon and Alexander testified some break-ins had occurred in the area about a week before; that no other businesses were open in that vicinity at that time of night; and that they did not know that the Big Value Food Store (located about a hundred yards from the filling station) had been burglarized or that any

other felony had been committed. The bag the tools were in bore the name Memphis Linen Supply. In his trial testimony Officer Cannon said he could see those things when he walked up to the car and that he could see them better when the defendant stepped out of the car to give him his driver's license. McLennan was from Memphis and Welch was from West Memphis, Arkansas. The automobile belonged to McLennan's brother who also lived in Memphis. The officers took McLennan and Welch into custody at that time for possession of burglary tools and placed them in the rear of the patrol car and drove to police headquarters. While waiting for the police chief to arrive, McLennan was seen putting something behind the rear seat of the patrol car, which turned out to be the keys Welch had and a bar of soap.

In the bag were four crowbars, a sledge hammer, a hatchet and a chisel, and in the trunk of the car a screwdriver and another pair of gloves were found.

After leaving the defendant and Welch at headquarters, Officer Cannon returned to the area and found that the rear door of the Big Value Food Store had been pried open from the inside. It was found that a hole approximately 12 by 16 inches had been cut in the store roof and insulation material was all over the floor. The owner identified the keps which Welch had when arrested and which the defendant later placed behind the rear seat of the patrol car, and was of opinion that while an ordinary man could get through the hole in the roof it was doubtful whether it would accomodate the defendant. The inside lock of the rear door and a bar across it had been removed. Nothing except the set of keys had been taken.

Welch's coat and gloves and a sample of the Big Value Food Store's roof and insulation materials were examined by the FBI laboratory, where it was determined that the

debris on the coat and gloves came from the same building as the roofing and insulation materials or ". . . from another source having the same materials with similar microscopic characteristics."

The defendant did not testify, and contented himself with presenting some alibi witnesses. In essence, they testified that he had been in Memphis on October 16 until midnight or later. The defendant's brother testified that sometime after midnight the defendant asked to borrow his car. Welch, who said he was 5'9" and weighed 150 pounds, testified that on October 16 while he was "messing around" Savannah, someone took his car and he called the defendant to come after him; that early on the morning of October 17 the defendant picked him up and the police stopped them a few minutes later; that the bag of tools belonged to him and he threw them into the car when the defendant arrived; and that he did not know the location of the Big Value Food Store.

From the foregoing review of the testimony, it is perfectly obvious that whether the defendant's conviction stands or falls must depend upon whether he was legally stopped and arrested by the Savannah police officers, because without the articles they seized and their testimony the State could not have made out a case of possession of burglary tools against the defendant.

In its brief, the State makes the assertion that the officers stopped the car for the sole purpose of ascertaining who they were and what they were doing at that time of night, and that the question presented is whether or not under the circumstances the officers acted in good faith in pursuance of their duty to prevent crime. The State also admits that, not being State safety officials or highway patrolmen, these officers had no obligation to stop the auto-

mobile simply for the purpose of checking the driver's license.

It is uncontroverted in this record that the two policemen had previously followed a practice of stopping vehicles seen emerging from closed places of business late at night because they considered such activity suspicious, and that they did so in this instance notwithstanding the defendant's car was not speeding or otherwise violating any law and was being operated normally, and notwithstanding the officers did not know and had not heard that any burglary or other crime had been committed in the city that night. Nor was there anything in the conduct of the defendant and Welch to indicate a purpose to violate any law or a threatened breach of the peace. Upon this record there can be no doubt that in their zeal these officers habitually stopped and checked automobiles on pure suspicion when seen in like circumstances late at night, and that they stopped the defendant's car for no other reason. They did not claim that they knew or had heard that a felony had been committed or that they suspected that any crime had occurred in the city that night.

Mere general suspicion is not probable cause for a warrantless arrest, and is not enough to justify such an arrest. *Dobbins* v. *State,* 206 Tenn. 59, 63, 332 S.W.2d 161; *Harlow* v. *State,* 159 Tenn. 537, 20 S.W.2d 1045; *Hughes* v. *State,* 145 Tenn. 544, 571, 238 S.W. 588; *Wong Sun* v. *United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441; *Henry* v. *United States,* 361 U.S. 98, 80 S.Ct. 168, 4 L.Ed.2d 134; 5 Am.Jur.2d., Arrest § 45.

The law is also definitely settled that the results of a search following an arrest cannot be taken into consideration in determining the validity of the arrest. *Murphy* v. *State,* 194 Tenn. 698, 254 S.W.2d 979; *Hughes* v. *State,* supra;

Henry v. *United States,* supra. In *Murphy* v. *State,* supra, the Supreme Court of this State said:

"In 56 C.J., Sec. 70, p. 1184, it is said:

> 'If a search and seizure is illegal at its inception it cannot become legalized by what it brings to light, rather must it be justified by the steps that precede the search and seizure, which themselves must be lawful in their entirety. Thus, if disclosed as the result of an illegal search, it is not justified by the discovery of contraband, gambling devices, or unlawfully possessed weapons; nor will a subsequent admission or confession of accused legalize a search illegal at its inception.'

"In support of the foregoing text there appears the following footnotes:

> 'If seizure is based on mere suspicion and the facts do not justify an arrest, the subsequent discovery by an examination of the evidence secured by the seizure that the suspicion was well founded is not sufficient to make what was unlawful at its commencement a lawful search.' *Garske* v. *U.S.,* 8 Cir., 1 F. (2d), 620, 621.
>
> "The doctrine that a search prosecuted in violation of the constitution is made lawful by what is brings to light has never been recognized by the United States Supreme Court, nor can it be tolerated under our constitutional system.' *Byars* v. *U.S.,* 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed. 520, rev. 8 Cir., 4 F. (2d) 507. See also 79 C.J.S., Searches and Seizures, Sec. 51."

There can be no question that the policemen arrested the defendant by stopping his car. In *Robertson* v. *State,* 184 Tenn. 277, 198 S.W.2d 633, the Court said:

". . . The stopping of a car by an officer for the inspection of a driver's license, or for any purpose where it

> is accomplished by the authority of the officers, is in fact an arrest, even though it be a momentary one in some cases. Nevertheless, it is accomplished by reason of the authority of the law and its officer. 'An arrest is the taking, seizing or detaining of the person of another, either by touching or putting hands on him, or by any act which indicates an intention to take him into custody and subjects the person arrested to the actual control and will of the person making the arrest.' 4 Amer. Jur. on Arrest, Sec. 2, p. 5; 6 C.J.S., Arrest, sec. 1, page 570 *et seq.* One of the few exceptions of the law relating to arrests without a warrant is the authority of highway patrol officers to stop a car and demand to see the license of the operator. . . . Others than State Highway patrolmen may not demand to see the license, unless the operator then or immediately, prior has been engaged in a violation of an ordinance or a statute. Code, Sec. 2715 (22) [TCA § 59-709]."

See also: *Murphy* v. *State,* supra; *West* v. *State,* 221 Tenn. 178, 425 S.W.2d 602.

In *Craven* v. *State,* 148 Tenn. 517, 256 S.W. 431, the late great Chief Justice Green wrote for the Court:

> "The history of our ancestors for three hundred years has demonstrated that police officers cannot be permitted to ransack at will the properties of the people. Intolerable conditions have always followed such practices. A revolution in England and the revolution of the American colonies are said by high authorities to have been largely influenced by promiscuous seizures and searches of the houses and effects of the people — efforts by the constituted authorities to procure evidence of the violation of regulations deemed wise by those in power, but unpopular with many, and constantly transgressed.

* * * * *

"Our statutes prescribe the procedure necessary to be observed by way of obtaining sanction to search the person or effects of a citizen, and a search made on less authority is unreasonable and in contempt of the Constitution.

"We can conceive of no exigency in time of peace that could induce this court to weaken the barriers put up by our fathers to prevent the abuse of this writ. They builded upon a bitter experience.

"At the very foundation of our State is the right of the people to be secure in their persons, houses, papers, and possessions. Infringement of such individual rights cannot be tolerated until we tire of democracy and are ready for communism or a despotism. The enforcement of no statute is of sufficient importance to justify indifference to the basic principles of our government."

The foregoing language was quoted with approval in *Robertson* v. *State,* supra.

Of course, it is fundamental that evidence derived from an unlawful arrest is the fruit of official illegality and cannot be used against the person unlawfully arrested over his objection. *Wong Sun* v. *U.S.,* supra.

Clearly, the defendant's fourth and fifth Assignments of Error are well taken and must be sustained. And, since, as noted earlier, his conviction rests essentially upon the admission in evidence of the articles illegally seized when he was unlawfully arrested and the testimony of the arresting police officers, his Assignments challenging the sufficiency of the evidence to sustain the jury's verdict must also be sustained. He has successfully carried his burden of demonstrating here that the evidence preponderates against the verdict of the jury and in favor of his innocence. *Jamison* v. *State,* 220 Tenn. 280, 416 S.W.2d 768; *Webster* v. *State,* —— Tenn.Crim.App. ——, 425 S.W.2d

799; *Morelock* v. *State*, —— Tenn.Crim.App. ——, 460 S.W. 2d 861.

The judgment of the trial court is reversed and this case is remanded thereto for a new trial.

/s/ W. Wayne Oliver
Judge

Concur:

/s/ Mark A. Walker
Presiding Judge

WALLACE LEWIS McLENNAN

vs.

STATE OF TENNESSEE

NO. 2, HARDIN COUNTY

DISSENTING OPINION

(Filed May 4, 1972)

Excellent police work resulted in the apprehension and subsequent conviction of McLennan, whose guilt is beyond dispute. I cannot agree that the officers acted illegally; nor that reversal would be required if they did.

At least four valid positions immediately come to mind, any one of which this Court could take to reject the contention accepted for reversal, and sustain this conviction without doing the slightest violence to constitutional principles. I strongly suggest that our Supreme Court review this case.

I.

The officers had grounds for a warrantless arrest. I cannot subscribe to the characterization that they acted upon mere suspicion. The language of our Supreme Court, first used in the unreported case of *Howard Martin* v. *State*, and then quoted in *Dittberner* v. *State*, 155 Tenn. 102, and later in *Jones* v. *State*, 161 Tenn. 370, 33 S.W.2d 59, is, in pertinent part:

> "The substance of these provisions is that an officer may lawfully proceed to arrest without a warrant any person when the officer has, with reasonable cause, been led to believe that the person has committed, is committing, or is about to commit a felony. It is essential to the protection of society that a wide dis-

> cretion be vested in officers chosen to enforce our laws against felonies. It is impossible to define 'reasonable cause' in terms to fit all cases arising. Each case must stand on its own facts. A narrow construction would open the way for the escape of desperate criminals and the defeat of justice. One too liberal would lead to the harrassment of the innocent. But the officer may not be required to wait for assurance, for evidence which would convict; when circumstances fairly point to a felony it is his duty to act, and act promptly."

In the case sub judice, I do not rely upon the fact that guilt was concretely established after the stopping. I say that the officers would have literally been derelict in their duty if they had not detained the defendant.

Here was the setting. Two officers were on patrol, basically business-house security, in a small (5,000 - 6,000) rural community at about 3:15 a.m. upon a main street where no businesses were open for blocks and hadn't been since about 10:00 p.m.; but where burglaries and vending machine larcenies had frequently occurred in the past, one burglary occurring only about a week before. They observed a car pull out from behind a service station building. The business had been closed for more than five hours. Vending machines were there. The car was a strange one to these small-town officers, having been seen for the first time only a few hours before. The car had National Guard license plates, not local plates. The occupants were unknown to the officers. The car had been stopped at a place and time where no legitimate business would likely be transacted, and no private property.

The officers determined to stop the car and find out who the men were. They didn't mean to arrest them initially, but did so only after plain-view observation showed burglary tools, two-way radios, a passenger sitting with gloves

between his knees, and his clothing covered with a foreign substance (insulation).

In this context, I would hold (1) that the officers had reasonable (probable) cause to believe that a felony had been committed, and (2) that these men were involved. My view is not hindsight, buoyed by the knowledge that subsequent developments proved the fact of the crime. Innocent strangers simply do not normally prowl the streets and businesses of small Tennessee towns at 3:15 a.m.; and those who are innocent who do should not complain if police officers momentarily detain them.

It is pertinent to keep in mind that *no search is involved in this case.* We are dealing with plain-view evidence, seen from a public street. It has long been settled that objects falling in the plain-view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. *Harris* v. *U.S.*, 390 U.S. 234, 19 L.Ed.2d 1067, 88 S.Ct. 992. The theory of the majority which I cannot accept, is that the officers were able to view the evidence only because they had first "illegally" stopped the car (arrested the accused), so it is "tainted" and inadmissible.

I see the actions of the officers as reasonable, legitimate police work in every respect. True, they did not yet *know* that a felony had been committed; but they had such a strong belief that as soon as the men were securely in jail one of the officers immediately returned to the area and found a store burglarized a short distance from where the men were first seen. Must police officers, in this context, let suspects escape while they confirm the *fact* of the crime?

Preachment has little place in judicial opinion. However, I think it relevant to the issue of probable cause, and reasonableness, to point out that the latest national

crime statistics released by the U. S. Department of Justice on March 30, 1972, show an 8% increase in burglaries during the previous year; and a total increase of 55% over the past five years. The fact that crime is on the verge of being out of control in vast areas of our country militates in favor of a more liberal view of the legitimate function of police than the holding in this case.

II.

Secondly, it could be said that no arrest was made by the initial stopping of the car. Certainly none was intended, until the burglary tools were seen. The officers stopped the car to learn the identity of the occupants. I believe that they had that right, in the context of this case.

A "grey area" exists in Tennessee law as to whether or not every stopping of an automobile is an arrest. *Robertson* v. *State,* 184 Tenn. 277, 198 S.W.2d 633, cited by the majority, and *Harris* v. *State,* 219 Tenn. 459, 410 S.W.2d 876, stand for the proposition that the stopping of a car is an arrest. But see *High* v. *State,* 188 Tenn. 166, 217 S.W.2d 744, which held that the stopping of the car was not an arrest in the technical sense, and defines an arrest as the apprehension or detention of the person of another in order that he may be forthcoming to answer an alleged or supposed crime.

I believe that officers, in a proper case, have the right to detain temporarily for investigation without making an arrest. To hold otherwise is to make effective police work impossible. Dragnets, interrogations, roadblocks, etc. would be impermissible.

Other states and the federal courts have many cases recognizing the right of an officer to investigate and make a

limited detention. *Terry* v. *Ohio,* 392 U.S. 1, 88 C.St. 1868, 20 L.Ed.2d 889, a United States Supreme Court case, holds that where an officer observes unusual conduct which leads him reasonably to conclude that criminal activity may be afoot he may approach a person even though there is no probable cause for arrest and make a limited search for weapons, which certainly is a detention. The action must be "reasonable"; and "there is no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails." *Terry* v. *Ohio,* supra. It was there said, further:

> "One general interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that *a police officer may in-appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest."* (Emphasis added.)

In a recent federal case, the U.S. Ninth Circuit Court of Appeals, in *U.S.* v. *Jackson,* decided September 13, 1971, and reported in 10 Criminal Law Reporter 2030, held that the Fourth Amendment's prohibition against unreasonable searches and seizures was not violated by police officers who, minutes after receiving an armed robbery bulletin, stopped an out-of-state car occupied by "three possible suspects" and questioned the suspects about their identities, addresses, and reasons for being in town.

The same court has since held, in *Blackstock* v. *U.S.,* 10 Criminal Law Reporter 2166, that every stopping of a car for investigation is not an arrest, saying:

> "* * * Blackstock's contention that every stop of a vehicle amounts to an arrest for which probable cause must be shown is in error. '[T]here is nothing

> ipso facto unconstitutional in the brief detention of citizens under circumstances not justifying an arrest, for purposes of limited inquiry in the course of routine police investigations.' Wilson v. Porter, 9th Cir., 1966, 361 F.2d 412, 415. To justify an investigatory stop short of an arrest '[a] founded suspicion is all that is necessary, some basis from which the Court can determine that the detention was not arbitrary or harassing.' Id. See also Jackson v. U.S., 9th Cir., 1970, 423 F.2d 506."

The U.S. Tenth Circuit Court of Appeals, in the case of *U.S.* v. *Alberty*, 10 Criminal Law Reporter 2032, October 7, 1971, rejected the argument that the only time a police officer may retain and search is when he has probable cause to arrest.

I believe that the Tennessee rule should comport to the federal principle enunciated in *Terry* v. *Ohio*, and that reasonable police detention short of formal arrest may lawfully occur. And the detention in the case under consideration was certainly reasonable.

Thirdly, the objection to the introduction into evidence of the burglary tools was clearly waived when the defendant called as his witness his companion (also indicted, but not tried with him) and the companion testified upon direct examination about the burglary tools, and claimed that they were his alone, and that he had placed them in the car. How can McLennan now be heard to complain that this evidence was improperly admitted in the first instance?

Our Supreme Court, in the case of *Lester* v. *State*, 216 Tenn. 615, 393 S.W.2d 288, had this to say:

> "[5] There are many cases in this jurisdiction and others which deal with the broad principle that if a defendant testifies in substance as to evidence which has been otherwise erroneously admitted, then his testimony clears whatever error there might have been.

See *Zachary* v. *State*, 144 Tenn. 623, 234 S.W. 758; *Moon* v. *State*, 146 Tenn. 319, 242 S.W. 39; *Switzer* v. *State*, 213 Tenn. 671, 378 S.W.2d 760; *Owens* v. *State*, 202 Tenn. 679, 308 S.W.2d 423; *Cathey* v. *State*, 191 Tenn. 617, 235 S.W.2d 601; and others. Thus, these cases clearly show that the rule is not limited to the situation where the defendant takes the stand and admits he committed the crime with which he was charged."

This principle is equally appropriate where, instead of himself testifying and giving the objected-to evidence an innocent cast, the defendant calls his co-defendant and offers his testimony that the burglary tools were in fact there, but that the defendant was not in possession of them. The defendant, by his proof and of his own volition, has placed the burglary tools in his car. Are we to say that the jury did not have their presence competently before them, in that context? The convicting evidence has been placed in the record by the defendant, and such action as a matter of logic waived any prior objection that he may have had to it. It rendered any prior error in the admission of such proof patently harmless.

One might say that the co-defendant would not have been called, had the evidence not already been admitted. But he was called; and if this reversal and remand is allowed to stand, this proof will again be available against this defendant, because he chose to present it and his co-defendant chose to testify. Are we to hold that upon remand only the defense witness may testify as to what was in the car? I have never before known of a case being reversed because of the improper introduction into evidence by the State of the same evidence voluntarily presented on behalf of the defendant.

III.

At the risk of being accused of overkill, I suggest a fourth objection to the majority opinion.

Our Supreme Court, in the case of *Satterfield* v. *State*, 196 Tenn. 573, 269 S.W.2d 607, dealt with a case in which an officer stopped the defendant's automobile and made a warrantless arrest for driving while drunk. The contention was made that the officer could not testify as to the defendant's condition, because the arrest was said to have violated the defendant's constitutional guarantee against unreasonable searches and seizures. Our Supreme Court held that the evidence was admissible even if the arrest were illegal, because there is no constitutional immunity from an unlawful arrest. I quote from the opinion:

> "The only question made on this appeal is that the State's evidence should have been excluded because all proof of his alleged intoxication resulted from an unlawful search. The argument of defendant's counsel seems to be that proof of his intoxication could not be established except by some form of search which violated his constitutional right. To this we cannot give our assent.
>
> "[2, 3] As we view the testimony his intoxicated condition was evidenced by his conduct and physical appearance. But if we should concede that the defendant's arrest was not justified there is no constitutional immunity from an unlawful arrest. The constitutional only guarantees freedom from 'unreasonable searches and seizures'. Article 1, Sec. 7. The right of the officer to search the car of the defendant is not involved in the instant case. We therefore express no opinion as to whether the search was lawful or unlawful.
>
> "The case of *High* v. *State*, 188 Tenn. 166, 217 S.W. (2d) 774, 775, controls the case at bar. The facts are almost identical with the case before us. There the police of the town of Gallatin received information

> that there was a disturbance several blocks down the street. They went to the place of disturbance and saw High pulling away from the curb. They stopped him and found that he was drunk. Exactly the same question was made there as is now being urged upon us. It was held: 'This was not a search and seizure as contemplated by our constitution.' The assignment is accordingly overruled."

What our Supreme Court has said, then, is that evidence obtained as a result of an illegal arrest, but without any search, is constitutionally admissible.

We, then, confront the U.S. Supreme Court "fruit of the poisonous tree" doctrine pronounced in *Wong Sun* v. *U.S.*, 371 U.S. 471, 83 S.Ct. 407, 9 L.E.2d 441, relied upon by the majority to render this evidence inadmissible. The U.S. Supreme Court has not yet applied this doctrine to state trials. In the case of *Clewis* v. *Texas*, 386 U.S. 707, 18 L.Ed.2d 423, 87 S.Ct. 1338, we find the following significant footnote:

> "7. The arresting officer testified that he merely asked petitioner to accompany him to the police station. He was of the opinion that he had no probable cause to arrest petitioner. Plainly, however, petitioner must be considered to have been taken into custody either at the time the officer came to get him, or shortly thereafter when the police by their conduct, effectively asserted a right to detain him indefinitely at the jail. The Court of Criminal Appeals *was apparently of the view that the rule of Wong Sun* v. *United States*, 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963), *is inapplicable to state trials — an issue upon which we express no opinion herein*, since we find petitioner's statement inadmissible on other grounds." (Emphasis added.)

I believe it fair to say that our Supreme Court has not held that what was plainly visible to an officer at the time

of an illegal arrest is inadmissible because the arrest was illegal; and that *Wong Sun* has not yet been made applicable to state trials.

V.

For all of these reasons, I respectfully dissent.

/s/ WILLIAM S. RUSSELL
Judge

COURT OF CRIMINAL APPEALS OF TENNESSEE, AT JACKSON

WALLACE LEWIS McLENNAN

vs.

STATE OF TENNESSEE

No. 2 Hardin County

Offense CARRYING BURGLARIOUS INSTRUMENTS

REVERSED AND REMANDED

#5121

JUDGMENT

Came the plaintiff in error, WALLACE LEWIS McLENNAN, by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the CRIMINAL Court of HARDIN County; and upon consideration thereof this Court is of opinion that there is reversible error on the record for the reasons set out in the opinion filed.

It is therefore, ordered and adjudged by this Court that the judgment of the Court below be *reversed* and the verdict of the jury set aside, and the cause *remanded* to the Criminal Circuit Court of Hardin County for a new trial.

The State of Tennessee will pay the costs of the appeal which will be certified to the Comptroller for payment in the manner required by law.

Office of Clerk of the Court of Criminal Appeals for the Western Division of the State of Tennessee:

I, JEWEL REDDEN, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the judgment of said Court pronounced at its October Term, 1971, in the case of Wallace Lewis McLellan vs. STATE OF TENNESSEE, as the same appears of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court, at office, in Jackson, Tenn., on this the 4th day of May, 1972.

/s/ JEWEL REDDEN, Clerk

cc Court below
Sheriff
Cost Bill

Felony—R & R

HARDIN CRIMINAL
HONORABLE JAMES L. ENGLAND, JUDGE

STATE OF TENNESSEE,

Petitioner,

vs.

WALLACE LEWIS McLENNAN,

Respondent.

FOR RESPONDENT:
W. LEE LACKEY,
SAVANNAH, TENNESSEE.

FOR PETITIONER:
DAVID M. PACK,
ATTORNEY GENERAL,

ROBERT H. ROBERTS
ASSISTANT ATTORNEY
GENERAL,
NASHVILLE, TENNESSEE.

JOHN L. WILLIAMS,
DISTRICT ATTORNEY
GENERAL,
HUNTINGTON, TENNESSEE.

OPINION

(Filed May 7, 1973)

Respondent was convicted of carrying burglarious instruments in violation of T. C. A. Section 39-908 and sentenced

to imprisonment for not less than one nor more than ten years.

The Court of Criminal Appeals reversed and remanded the case for a new trial by a two-to-one decision. We granted the State's petition for certiorari.

The only question involved is whether the Court of Criminal Appeals committed error in finding the trial judge should have sustained respondent's motion to suppress the evidence obtained by the two officers who arrested respondent.

At approximately three thirty A. M., on October 17, 1970, two police officers of Savannah, Tennessee, Cannon and Alexander, were making a routine patrol of the business district of the town where a number of business houses and vending machines on the outside had been broken into during recent months.

They saw a car with two men in it come out into the street from a service station which had been closed for several hours.

At the hearing on the motion of respondent to suppress the evidence, Cannon testified he had seen the car parked in a different part of the town a few hours prior with two persons in it.

Both officers testified the car was a strange one and had Tennessee National Guard license plates which did not designate a county of the State.

They followed the car a short distance. The car was not being operated in violation of law nor had the officers any evidence of any crime having been committed or about to be committed in the town that night. Nevertheless, the officers stopped the car. Cannon went to the driver's side while Alexander went to the opposite side. Respondent was the driver. Jackie Welch was the other occupant of the car.

The officers stated they had been stopping cars which came from a closed business building for identification purposes. They, also, testified they were suspicious of this car because it came from a closed service station; and that they stopped it to ascertain the identity of the persons therein and where they resided.

They testified Cannon asked respondent for his driver's license. When he got out of the car to hand his driver's license to Cannon, a light came on in the car.

They stated when the light came on in the car they could see a bag with a sledge hammer handle and crowbars protruding from it in the rear floorboard and two walkie-talkie radios on the back seat; and that they arrested respondent and Welch for possession of burglarious instruments.

The bag contained four crowbars, a sledge hammer, a hatchet and a chisel.

Welch was jointly indicted with respondent but was not put to trial with respondent. Welch testified at the trial. Respondent did not testify in his own behalf.

The majority opinion of the Court of Criminal Appeals, in reversing the trial judge, said a mere suspicion is not probable cause for a warrantless arrest.

That opinion, also, stated the officers arrested respondent by stopping the car. In making this statement, the majority relied on Robertson vs. State, 184 Tenn. 277, 198 S. W. (2d) 633 (1947).

We are of the opinion Robertson vs. State, supra, is not in point. In that case, two highway patrolmen stopped a car they were following on a public highway in daylight. The court said, under the facts of that case, the officers had no substantial reason to be suspicious; and that the stopping of the car was a subterfuge.

We think under the facts of this case, the officers had a right to stop the car to ascertain the identity of the occupants and where they resided. One of the officers first saw the car parked in a different section of the town with two men in it a few hours prior to stopping it. It was a strange car with license plates which did not designate a county of the State. It was seen by the officers coming out of a closed service station at an unorthodox hour of the day in a business section where a number of burglaries had occurred in recent months.

> "Granting that the constitutional prohibition against unreasonable searches and seizures makes no distinction between informal detention without cause and formal arrest without cause, there is a difference between that 'cause' which will justify informal detention short of arrest and the probable cause standard required to justify that kind of custody traditionally denominated an arrest. Our concern here is what degree of cause will justify cursory, informal detention in circumstances which would not justify an arrest, and whether the officers met that standard in the particular circumstances of this case.
>
> "We take it as settled that there is nothing ipso facto unconstitutional in the brief detention of citizens under circumstances not justifying an arrest, for purposes of limited injury in the course of routine police investigations. Rios vs. United States, 364 U. S. 253, 80 S. Ct. 1431, 4 L. Ed. (2d) 1688 (1960); Busby vs. United States, 296 F. (2d) 328 (1961). A line between reasonable detention for routine investigation and detention which could be characterized as capricious and arbitrary cannot neatly be drawn. But due regard for the practical necessities of effective law enforcement require that the validity of belief, informal detention be recognized whenever it appears from the totality of the circumstances that the detaining officers could have had reasonable ground for their actions. A

founded suspicion is all that is necessary, some basis from which the court can determine that the detention was not arbitrary or harassing." Wilson vs. Porter, 361 F. (2d) 412 (1966).

"The local policeman, in addition to having the duty to enforce the criminal laws of his jurisdiction, is also in a very real sense a guardian of the public peace and he has a duty in the course of his work to be alert for suspicious circumstances, and, provided that he acts within constitutional limits to investigate whenever such circumstances indicate to him that he should do so." Frye vs. United States, 315 F. (2d) 491 (1963).

"While the Fourth Amendment may be construed as encompassing 'seizure' of an individual, it cannot be contended that every detention of an individual is such a 'seizure.' If that were the case, police investigation would be dealt a crippling blow, by imposing a radical sanction unnecessary for the protection of a free citizenry. Under such a theory, a policeman could not stop and question a person standing next to a bloody corpse." United States vs. Bonanno, (DCNY) 180 F. Supp. 71 (1960).

"The process of inquiry may involve some restraint on the individual liberty of some people of whom police make inquiries without arrest. It would be absurd to suggest that police must arrest a person before they can ask him questions." Goldsmith vs. United States, 107 App. DC 305, 277 F. (2d) 335 (1960).

"The essential needs of public safety permit police officers to use their faculties of observation and to act thereon within proper limits. It is not only the right but the duty of police officers to investigate suspicious behavior, both to prevent crime and apprehend offenders." State vs. Fish, 280 Minn. 163, 159 N W (2d) 786 (1968).

This Court, in Sneed vs. State, 221 Tenn. 6, 423 S. W. (2d) 857 (1968), stated:

> "That constitutional rights are not violated when a law officer, without any trespass against the defendant, and while he is at a place he had a right to be, looks and sees evidence against a defendant which is plainly visible."

The officers saw the criminal evidence prior to the arrest. Such was not a search and seizure as contemplated by the constitution. Batchelor vs. State, 213 Tenn. 649, 378 S. W. (2d) 751 (1964); Armour vs. Totty, — —Tenn. ——, 486 S. W. (2d) 537 (1972).

We are of the opinion the majority opinion of the Court of Criminal Appeals is erroneous in holding the stopping of the car and asking the driver to display his driver's license was an illegal arrest. It is clear from the record the officers did not stop the car for the sole purpose of checking the license, if any, of the operator. On the contrary, the car was stopped for the purpose of ascertaining the identity of the occupants and where they resided.

The arrest occurred after the criminal evidence was in plain view.

> "An arrest, as the term is used in criminal law, signifies the apprehension or detention of the person of another in order that he may be forthcoming to answer an alleged or supposed crime," High vs. State, 188 Tenn. 166, 217 S. W. (2d) 774 (1949).

The judgment of the Court of Criminal Appeals is reversed and the judgment of the trial court is affirmed.

/s/ CHESTER C. CHATTIN
JUSTICE

DYER, C. J.,
HUMPHRIES AND McCANLESS, JJ.,
AND WILSON, S. J., CONCUR.

IN THE SUPREME COURT OF TENNESSEE, AT JACKSON

STATE OF TENNESSEE,

Petitioner

vs.

WALLACE LEWIS McLENNAN

Respondent

HARDIN CRIMINAL NO. 1

Offense: Carrying Burglarious Instruments

Court of Criminal Appeals Reversed and Trial Court – AFFIRMED

No. 5121

JUDGMENT

Came the Petitioner, STATE OF TENNESSEE, and also came the Respondent, WALLACE LEWIS McLENNAN, by counsel, and this cause was heard on the transcript of the record from the Circuit Criminal Court of Hardin County; and upon consideration thereof this Court is of opinion that there is no reversible error on the record and that the judgment of the Court of Criminal Appeals is reversed, and the judgment of the trial court if AFFIRMED, and it is accordingly so ordered and adjudged by the Court.

It is, therefore, ordered by the Court that the Respondent, WALLACE LEWIS McLENNAN, for the offense of Carrying Burglarious Instruments be delivered to the Warden of the penitentiary, or his agent, and be by him conveyed to the penitentiary of the State of Tennessee and there confined at hard labor for a term of *NOT LESS THAN ONE YEAR and NOT MORE THAN TEN YEARS,* commencing on the day of his reception at said penitentiary.

The respondent will pay the costs of the cause accrued in this Court, and in the Court below, and execution may issue from this Court for the costs of the appeal. A procedendo will issue to the said Criminal Court of Hardin County, directing that Court to proceed with the collection of the cost of the cause accrued therein in the manner provided by law.

The Clerk of this Court will issue a duly certified copy of this judgment to the Sheriff of Hardin County, which will be his authority for delivering the Respondent to the Warden or his agent; and also a duly certified copy hereof to the Warden of the penitentiary, who will at once proceed to execute this judgment.

5-7-73

OFFICE OF CLERK OF THE SUPREME COURT FOR THE WESTERN DIVISION OF THE STATE OF TENNESSEE:

I, Jewel Redden, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the judgment of said Court pronounced at its April Term, 1973, in the case of STATE OF TENNESSEE -vs- WALLACE LEWIS McLENNAN, as the same appears of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the Court, at office, in Jackson, Tennessee, on this the 7th day of May, 1973.

/s/ JEWEL REDDEN, Clerk

cc: Court below
Warden
Sheriff
Cost bill

HARDIN CRIMINAL

WALLACE LEWIS McLENNAN,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

ON PETITION TO REHEAR

(Filed June 7, 1973)

Petitioner has filed an earnest petition to rehear. He insists we overlooked the case of St. John vs. State, 491 S. W. (2d) 629 (1973). It is true we did not mention that case in our opinion because it is not in point.

In that case, an officer illegally arrested St. John while he was sitting in his car on an alleged charge of reckless driving without a warrant and upon information alone.

After the illegal arrest, the officer noticed a pistol sticking from under the front seat. The Court of Criminal Appeals properly held the seizure of the pistol was also illegal, notwithstanding the plain view doctrine.

The petition is denied with costs.

/s/ CHESTER C. CHATTIN
JUSTICE

DYER, C. J.,

HUMPHREYS AND McCANLESS, JJ.,
AND WILSON, S. J., CONCUR.